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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE HOME INSURANCE COMPANY, *et al.*,

Petitioners,

v.

ELI LILLY AND COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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LIST OF PARTIES

Petitioners incorporate by reference their list of parties contained in pages ii-v of their Petition for a Writ of Certiorari filed November 20, 1986, in Supreme Court No. 86-822. Petitioners also incorporate by reference their respective Rule 28.1 statements appearing in Appendix G thereto, except as to the petitioners also appearing in No. 86-818 who incorporate by reference the Rule 28.1 statement at page ii of that separate petition.

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PETITIONERS' REPLY BRIEF

I. THE FOURTH CIRCUIT IS NOW ALSO IN CONFLICT WITH THE DISTRICT OF COLUMBIA CIRCUIT.

The widening division among federal courts of appeal has now been exacerbated by the decision of the Fourth Circuit in *Mraz* v. *Canadian Universal Insurance Co.*, 804 F.2d 1325 (4th Cir. 1986), reported after the filing of the present petition in this Court. In *Mraz* the issue was insurance coverage for a time-delayed pollution loss; the policy language, substantially the same as that here and in the other cases cited by petitioners. Upon its own reading

of the language and consideration of the evidence developed at trial bearing on the facts of the claim, the Fourth Circuit concluded that coverage was triggered at the single point when the injuries first manifested themselves — a point held to be when the leakage and damage was first discovered. *Mraz* is thus inconsistent with *Lilly* not only in ultimate outcome but, more important for the purpose of the present petition, with respect to the proper fact-finding role of a federal court sitting in diversity. No differing general principles of state law are adequate to explain such divergent approaches to the making of factual decisions. For, as the First Circuit has observed,

> "[A]n argument between parties about the meaning of a contract is typically an argument about a 'material fact,' namely, the factual meaning of the contract." *Boston Five Cents Savings Bank* v. *Secretary of the Department of Housing and Urban Development,* 768 F.2d 5, 8 (1st Cir. 1985).

II. THE ISSUES PRESENTED BY THE PETITION WERE NOT RESOLVED IN *RUHLIN.*

Lilly directs this Court's attention to *Ruhlin* v. *New York Life Insurance Co.,* 304 U.S. 202 (1938), a companion case to *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938), in which this Court extended the *Erie* doctrine to suits in equity. The issue in *Ruhlin* was whether an insurer could rescind, because of fraud, the disability and double indemnity provisions of an insurance contract, notwithstanding (or, the insurer argued, as permitted by) the terms of an incontestability clause. As is apparent from this Court's opinion, the issue arose on a motion to dismiss the insurer's bill in equity. The record in this Court confirms the obvious point that, in that procedural context, the allegations in the insurer's bill were taken as true. There were, therefore, no factual matters in dispute outside the contract, nor was there any question

of determining whether particular facts existed that would give rise to coverage.[1]

As to *Clay* v. *Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960), cited by both petitioners and respondents, it need only be noted that there was, again, no dispute whatever as to the facts upon which coverage was claimed. After certification, no party challenged the contract reading of the Florida Supreme Court. *Sun Insurance Office, Ltd.* v. *Clay*, 319 F.2d 505, 509 (5th Cir. 1963), *rev'd on other grounds sub nom. Clay* v. *Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964). Lilly quotes Professor Wright's comment that, notwithstanding statements in the second *Clay* decision in the court of appeals, it is "now accepted that the state answers are binding." 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 4248 at 532 (1978). The important question presented here, however, is "binding" as to what?

III. PETITIONERS' CLAIM OF RIGHT TO A FACTUAL DETERMINATION OF WHEN INJURY OCCURS WAS EXPLICITLY PRESERVED AT EVERY STAGE OF THIS CASE.

Lilly suggests that the insurers have waived their right to challenge the Court of Appeals' deference to Indiana with respect to

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[1] The federal authorities cited in *Ruhlin* differed on whether the incontestability provision was ambiguous, and the *Ruhlin* Court, which had granted certiorari because of that conflict, suggested that the conflict "may be merely corollary to a permissible difference of opinion in state courts." 304 U.S. at 206. That possibility, of course, continues to exist: one state might, as a matter of general state law, apply a doctrine of reasonable expectations; another might require that the actual intent of the parties be determined. *Ruhlin* nowhere suggests, however, that by a judicial ruling in a particular case — even if labelled one "of law" — a state may preempt the federal fact-finding function. If the Court's reference to "power" is taken to go that far, then it was surely clarified by *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958) and its progeny, which explicitly preserve these independent federal functions in a post-*Erie* world.

the "factual predicate" of ambiguity and the "somewhat artificial legal meaning" of "injury." To the contrary, insurers have contended throughout these proceedings that the meaning of "injury" was not inherently ambiguous but, for its application to particular claims, did require consideration of scientific and medical evidence.[2]

Thus, in the District Court:

"Lilly therefore attempts to address the underpinnings of *Keene* by the following assertions:

(1) That '[a]mbiguity [of the policy language] is beyond dispute.'

. . . .

(5) That the underlying DES cases for which it seeks indemnity 'necessarily involve claims that injury occurs from ingestion through manifestation.'

As discovery to date has shown, however, *these and other issues of material fact are in substantial dispute.*" Statement of Points and Authorities of Defendants in Opposition to Plaintiff's Motion for Summary Judgment at 25-26 (emphasis added).

* * *

"Lilly, relying solely on the affidavit of a layman, disclaims knowledge of how DES might cause either adenosis or cancer . . . Against this disclaimer the defendants have proffered the affidavit of a medical expert thoroughly familiar with DES, establishing that:

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[2] In proffering their evidence that Lilly negotiated and drafted significant sections of the contracts, and applied the contract language and obtained money from the insurers on a basis inconsistent with the position it has urged in this lawsuit, the insurers assumed *arguendo* the ambiguity of the contractual language. With respect to the evidence concerning the application of the contractual language to the very claims for which Lily seeks reimbursement, however, the insurers never made any such concession.

> 'There is no clinical evidence that any of the conditions associated with DES arise out of a single continuous injurious process or entail a single course of injury running from maternal ingestion of DES to adulthood.' Burke Aff. ¶ 14.

This crucial point rests on substantial research and clinical work performed in the area. Burke Aff. ¶¶ 2, 3, 7." *Id.* at 14.

* * *

"Material *factual* disputes pervade every aspect of this case [including] . . . the nature of DES-related injury or disease." *Id.* at 29-30 (emphasis added).

* * *

"The interpretation of an ambiguous contract in light of available extrinsic evidence is a question of fact to be determined by the trier of fact and not by the court on summary judgment." *Id.* at 34.

* * *

"In all instances where DES is alleged to have caused an injury or disease, a specific moment at which the particular injury or disease occurred can be pinpointed — either at or about the time of the mother's ingestion or the time of the daughter's manifestation." *Id.* at 53.

* * *

"This dispute as to when an injury or disease caused by DES occurs puts in issue a material fact . . . ." *Id.* at 54.

The insurers' assertion of factual disputes with respect to when injury occurred was repeated — with citations to medical evidence — in the insurers' Statement of Genuine Issues and Supplemental Statement of Genuine Issues. *See* Supplemental Statement of Genuine Issues at 19-23.

It is quite true that the District Court found "injury" to be ambiguous, while at the same time refusing to consider any of the insurers' medical or scientific evidence. Far from acquiescing in this finding, however, the insurers challenged it on appeal.

Thus, in the Court of Appeals:

> "There is nothing invariably ambiguous about the policy language here at issue . . . This controversy results from the need to construe otherwise clear policy language 'when used in the context' of DES-related claims." Joint Brief of Defendants-Appellants at 49 n.34.
>
> * * *
>
> "DES-related conditions do not occur throughout each point in time from ingestion through manifestation. . . ." *Id.* at 35.
>
> * * *
>
> "[E]ven assuming that under Indiana law the doctrine of 'objective reasonable expectations' must be applied, the District Court should have considered extrinsic evidence on the etiology of DES-related conditions. . . ." *Id.* at 37.

And, with respect to the role of federal law in determining whether disputed medical evidence and inferences precluded summary judgment, the insurers, having cited numerous federal cases, *id.* at 57, said:

> "Although this aspect of the case is governed by federal law, it may be noted that Indiana courts have consistently denied summary relief when confronted with material factual issues such as these." *Id.* at 58 n.39.

Lilly's assertions in the District Court and on appeal that *Keene* provided a "law of the circuit" entirely independent of controlling state substantive law did, without question, cause insurers to emphasize the importance of Indiana law to the ultimate resolution of this case. As the foregoing citations illustrate, however, it is equally clear that insurers contended from the outset, and on ap-

peal, that the District Court could not apply the language of a contract to claims of injury outside the contract without considering evidence from both parties concerning the existence of those injuries.

On certfication to Indiana, the insurers reiterated their position:[3]

> "The language is clear . . . in at least one respect: *something* must happen during the policy period to trigger coverage, and that something is 'injury.' That requirement applies to all claims, including later emerging time-delayed claims like those associated with DES. Yet medical evidence proffered by both sides showed that, at least with respect to cancer cases, *nothing* — and certainly nothing that could be called bodily injury — happens to the daughter during the period between ingestion of the drug and the appearance of the cancer." Joint Brief of Defendants-Appellants in Support of Petition for Rehearing at 17 (emphasis in original) (footnote omitted).

* * *

> "Interpretation of a insurance contract specifically linked to a policy period — even under rules of construction — requires

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[3] The parties were not given the opportunity to comment on the Court of Appeals' questions prior to certification, and that court's docket reflects that promulgation of the court's questions was immediately followed by transmission of those questions to Indiana. In this regard the District of Columbia practice departs from that indicated by Professor Wright as the better procedure. *See* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4248 at 530-31 (1978). In any event, however, the insurers' objection was not to the questions but to the use made by the Court of Appeals of the answers. Given the available procedures in Indiana, the Indiana Supreme Court's reception of insurers' rehearing filing "to consider questions on the merits when possible," and the full briefing in the Court of Appeals prior to that court's final decision, there is simply no basis for suggesting that the insurers failed to make their arguments in an appropriate way so as to preserve those contentions for this Court's consideration.

application of the language to the facts of what has occurred, and not occurred, during that period." *Id.* at 19-20.

With respect to the Indiana Supreme Court's statement that ambiguous insurance contracts are resolved as a matter of law, the insurers said:

"That rule applies only where the ambiguity is apparent on the face of the contract, not where the ambiguity arises from application of that language to a particular loss. . . . Lilly itself concedes that as to most claims 'no issue of interpretation of the policy is raised.' " *Id.* at 30 n.19 (citations and emphasis omitted).

And

"[A]ctions under federal diversity jurisdiction, including declaratory judgment actions, are subject to the Seventh Amendment to the U.S. Constitution. . . . While there are, of course, many decisions holding that the construction of contracts is a matter for the court, the finding of facts to which the contract is to be applied — here, for example, *when* bodily injury occurs — is classically a matter for a jury if one is claimed." *Id.* at 36 n.22 (emphasis in original) (citations omitted).

Finally, on post-certification proceedings in the Court of Appeals: *see, e.g.*, Joint Post-Certification Supplemental Memorandum of Defendants-Appellants at 5 n.3 (" '[W]hen the DES-related "injury" "occurs" ' is a fact, by definition, outside the language of the policy and, if it mattered, any ambiguity would therefore be 'latent.' "); at 6 ("[T]he existence or absence of 'injury' at any moment in time would seem to be quintessentially a question of fact . . . ."); at 10 ("The Indiana Decision . . . cannot be applied to these contracts, consistently with federal law, until the finder of fact has determined the time at which DES-related injuries occur . . . ."); and at 24 ("The finding of facts to which contractual language is to be applied — here, for example, the time at which bodily injury occurs — is classically a matter for a jury.").

Accordingly, contrary to Lilly's assertions, the record plainly shows that the insurers preserved the issues presented here: where the asserted ambiguity arose from the disputed facts about the DES claims themselves, then a federal court in diversity was required to base its decision on a federal resolution of those facts.

Respectfully submitted,

December 31, 1986

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